If, on the other hand, the market value declines after the conversion it has been said that the plaintiff is really benefited by the misappropriation and should therefore recover only nominal damages.[16] While it is true that in such a case the plaintiff is not actually injured, to allow only nominal damages would violate the principle that one standing in a fidicuary capacity must not be permitted to profit by a conversion of the *cestui's* property, and consequently the recovery should be based on the amount realized by the defendant from the conversion.[17] Inasmuch, therefore, as the suit while technically in trover is really one for a breach of trust, damages should be assessed in accordance with the theory governing such actions.[18] It follows, then, that the plaintiff should be allowed to recover not the total proceeds of the sale, but only the value of his interest, which is to be measured by the difference between the sum obtained by the broker and the amount of the debt.[19]

The question was recently passed upon in *McIntyre* v. *Whitney* (1910) 124 N. Y. Supp. 234. Since the market value of the stock declined after the defendant's wrongful act, both the prevailing and the dissenting opinions adopted the rule that in such an instance the recovery should be based on the value at the time of the misappropriation. Yet, in spite of the fact that the defendant had sold the stock for an amount greater than the current value, the majority of the court considered the market price as the basis of the award. The dissenting opinion, apparently recognizing that this result would permit the defendant to retain a part of the profits of the conversion, properly contended that the measure of damages should be the difference between the sum realized by the broker and the amount of the debt.[20]

TESTAMENTARY INTENT AS DETERMINING THE VALIDITY OF CONDITIONS IN RESTRAINT OF MARRIAGE.—The complexity of the law with regard to conditions in restraint of marriage is due largely to historical causes. Under the civil law, as adopted by the ecclesiastical courts in the administration of legacies, all such restraints were deemed void as opposed to public policy. The courts of equity, however, realizing that possibly this doctrine was inapplicable in England, and that it was obviously incompatible with common law principles, were unwilling to adopt the civil law in its entirety. Hesitating on the other hand wholly to repudiate it, they attempted by introducing exceptions to bring it into alignment with the theory of English law.

As a result of the compromise thus brought about, the courts while adhering to the rule which condemned all conditions totally restraining

[16]Colt *v.* Owens (1882) 90 N. Y. 368. See also Gruman *v.* Smith *supra,* and dissenting opinions in Markham *v.* Jaudon *supra.*

[17]Taussig *v.* Hart (1874) 58 N. Y. 425.

[18]*Cf.* 10 COLUMBIA LAW REVIEW 250.

[19]See Barber *v.* Ellingwood (N. Y. 1910) 137 App. Div. 704.

[20]The case was complicated by the fact that the customer had paid off a part of his indebtedness to the broker after the conversion but before its discovery. The majority of the court allowed this amount to be included as part of the recovery, while the dissenting judge argued that since these payments had been made after the right of action had accrued, they should not be considered in estimating the damages, but that they could be recovered in a separate action.

marriage or materially lessening its probability,[1] upheld the validity of those which operated only in partial or reasonable restraint, as the prohibition of marriage with a particular person, or within a designated class. In like manner, conditions forbidding marriage before twenty-one, or without the consent of a third person were considered proper.[2] The one exception to the above rules is to be found in those decisions which recognize the validity of conditions wholly restraining the marriage of a widow[3] or widower.[4] It is to be observed, however, that in all these cases the circumstances have been such as to justify the inference of an intent either to furnish support for the legatee while single, or to provide for the maintenance of minor children,[5] rather than an intent to prohibit marriage absolutely. Even where the donee was the spouse of another than the testator[6] the courts have not hesitated to draw this inference and, by executing the testamentary intent thus discovered, to avoid the consequences of the rule declaring void all conditions restraining marriage.

The tendency to escape as far as possible the consequences of this rule is further indicated by the attitude of the courts in the administration of legacies. Under the civil law theory a condition void as an improper restraint on marriage was wholly disregarded, and consequently whether precedent or subsequent, could not affect the vesting or divesting of the gift. Although this rule seems at first to have obtained in England,[7] the later decisions, influenced by the theory of the common law, declared that in case of a condition precedent, noncompliance with its terms was sufficient to prevent the gift from vesting even though these terms involved a void restraint.[8] However pertinently it might be argued in this connection that a void condition is no condition at all, the result is at least consistent with the common law conception that a gift cannot vest in one who fails to answer the description indicated by the terms upon which it is made.

In dealing with such stipulations when presented in the form of conditions subsequent, an even more marked tendency to avoid the consequences of the civil law theory is evidenced. Thus, if the restraint was partial and therefore valid, the courts, by an application of the so-called *"in terrorem"* doctrine, allowed the legatee to retain the property even after breach unless there was a gift over, in which case it passed to the person next entitled.[9] Although the exact basis

[1]Lowe *v.* Peers (1768) 4 Bur. 2225; Morley *v.* Rennoldson (1843) 2 Hare 570; 2 Pomeroy Eq. Jur. § 933.

[2]Fry *v.* Porter (1669) Ch. Cas. 138; Scott *v.* Tyler (1788) 2 Br. 431, 2 Dick. 712; Stackpole *v.* Beaumont (1796) 3 Ves. 89; Jenner *v.* Turner (1880) L. R. 16 Ch. Div. 188.

[3]Barton *v.* Barton (1694) 2 Vern. 308; Phillips *v.* Medbury (1829) 7 Conn. 568; Gough *v.* Manning (1866) 26 Md. 347.

[4]Allen *v.* Jackson (1875) L. R. 1 Ch. Div. 399; Bostick *v.* Blades (1882) 59 Md. 231.

[5]See Newton *v.* Marsden (1862) 2 J. & H. 356.

[6]Allen *v.* Jackson *supra;* Newton *v.* Marsden *supra.*

[7]See Reynish *v.* Martin (1746) 3 Atk. 330.

[8]Stackpole *v.* Beaumont *supra;* Clifford *v.* Beaumont (1828) 4 Russ. 325; Young *v.* Furze (1857) 8 De G. M. & G. 756.

[9]Cullen *v.* Ready (1743) 2 Atk. 587; Lloyds *v.* Branton (1817) 3 Mer. 108. A residuary clause in the will is not a gift over within the meaning

of this rule is not clear, two arguments are offered in its justification. On the one hand, it is said that the rights of the legatee over imperatively demand that the legacy be forfeited after the condition is broken. On the other hand, the absence of a gift over is considered as justifying an inference that the stipulation was intended not as a real condition, the breach of which should divest the gift, but rather as a threat to prevent the legatee from disregarding the testator's wishes.[10] To so interpret the meaning of the condition obviously does violence to the actual expression of the testator, yet such seems to be the construction most frequently adopted by the courts. The very fact of its introduction is, at any rate, indicative of a growing tendency to preserve to the donee his gift by finding, if possible, a testamentary intent in the execution of which this result can be accomplished.

In the recent case of *Knosk* v. *Knosk* (Mo. 1910) 129 S. W. 666, the testator devised property to his daughter, subject, however, to a condition that in the event of her marriage a part of the property should pass to her sisters. The court construed the stipulation as a condition subsequent, and declared it void as contrary to public policy. Although the result is in accord with the attitude manifested by the courts in the early decisions, it undoubtedly results in a situation which was not contemplated by the testator and which could have been avoided had he used words indicating a limitation rather than a condition, for while the latter are declared void the former are universally considered proper.[11] It is of course arguable that in practice no such distinction should be observed since both operate to deprive the donee of the property after breach, and since the one is as effective as the other to restrain marriage. In legal theory, however, the operation of a condition is wholly unlike that of a limitation for while the latter marks the end of an estate the former operates to cut it off before its natural termination. In view of the desire of the courts to effectuate wherever possible the testator's intention is not strange that they seized upon this technical distinction in order to support the limitation. This position, moreover, is not entirely without reason for it may well be argued that, whereas the imposition of a condition indicates a testamentary intent to restrain marriage, a limitation merely evidences a purpose to furnish support during celibacy. Obviously, this contention is convincing only if the rule prohibiting such restraints is aimed at

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of this rule, Garret *v.* Pritty (1693) 2 Vern. 293, unless it is expressly provided that the legacy shall fall into the residue after breach. Lloyd *v.* Branton *supra.* The *in terrorem* doctrine is limited to legacies and never applied to devises, see Jenner *v.* Turner *supra,* which were administered under the strict common law principles as applied to conditions, unaffected by the influence of the ecclesiastical courts.

[10]Lloyds *v.* Branton *supra.* Some courts have applied the *in terrorem* doctrine in the case of a legacy to a widow, Hoopes *v.* Dundas 10 Pa. St. 75, but the authorities on this point are divided. See Phillips *v.* Medbury *supra.* And see *ex parte* Dickson's Trusts (1850) 1 Sim. [N. S.] 37, in which Wigram, V.-C. wholly repudiates the *in terrorem* doctrine as applied to conditions.

[11]Arthur *v.* Cole (1880) 56 Md. 100; Selden *v.* Keen (Va. 1876) 27 Gratt. 576; Heath *v.* Lewis (1853) 3 De G. M. & G. 954. See Jones *v.* Jones (1876) L. R. 1 Q. B. Div. 279 and the *dictum* of Wigram V.-C. in Morley *v.* Rennoldson *supra.*

the purpose rather than at the results of the condition, and this is the position taken by some of the later decisions.[12]

Such has been the result even where the courts have construed the stipulation as a condition and consequently it has been held that if an intention to support, rather than to restrain marriage, can be discovered the condition will be upheld even though it incidentally tends to restrain.[13] In view of the liberal attitude manifested in these decisions, the court in the case under discussion, although it felt bound to construe the language as importing a condition, might have interpreted it as a provision intended to furnish maintenance until marriage, and therefore valid, thus accomplishing the result desired by the testator.

ADMISSIBILITY OF EVIDENCE *res inter alios acta*.—The rule that evidence of *res inter alios acta* is inadmissible[1] has become subject to so many exceptions that, as a principle of general application, its value has been considerably diminished. Viewed solely from the standpoint of its inherent relevancy such evidence surely is not under all circumstances to be deemed inadmissible,[2] for the term relevancy does not, strictly speaking, connote the necessity of absolutely conclusive proof.[3] Logically, it need have only such probative value as will reasonably tend to justify the conclusion in support of which it is offered.[4] It is, of course, obvious that proof of a pre-existing fact which, though similar to that in issue, has no causal connection therewith does not necessarily determine the character of the one in question and to this extent such evidence may properly be considered irrelevant. It is true, nevertheless, that a previous act, omission or result, may be so characterized by a particular mental attitude or peculiar physical condition of the thing producing the result that the continuance of such attitude or condition becomes probable upon proof of a later similar act. Thus, having established the existence of a particular plan,[5] habit[6] or custom,[7] proof of specific acts done in accordance therewith raises a presumption that subsequent similar acts are also the result of the same mental attitude. In like manner, evidence of frequent accidents at a given place is pertinent in an inquiry as to its dangerous character[8] and proof of negligence[9] or due care[10] under given conditions, although by no

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[12]Jones *v.* Jones *supra;* Mann *v.* Jackson (1892) 84 Me. 400; and see Selden *v.* Keen *supra; cf.* Cooper *v.* Remsen (1821) 5 Johns. Ch. 459; Thayer *v.* Spear (1855) 58 Vt. 327.

[13]Jones *v.* Jones *supra;* Mann *v.* Jackson *supra.*

[1]Holcombe *v.* Hewson (1810) 2 Campb. 391; Delamotte *v.* Lane (1840) 9 C. & P. 261.

[2]Darling *v.* Westmoreland (1872) 52 N. H. 401.

[3]Lane *v.* B. & A. R. R. Co. (1873) 112 Mass. 455.

[4]Shea *v.* City of Lowell (Mass. 1864) 8 Allen 136.

[5]Hoxie *v.* Home Ins. Co. (1864) 32 Conn. 21.

[6]Smock *v.* Smock (1856) 11 N. J. Eq. 153.

[7]Pierson *v.* Atlantic Nat. Bank (1879) 77 N. Y. 304.

[8]District of Columbia *v.* Armes (1882) 107 U. S. 519; Quinlan *v.* City of Utica (N. Y. 1877) 11 Hun. 217.

[9]Parkinson *v.* Nashua & Lowell R. R. Co. (1881) 61 N. H. 416.

[10]Davis *v.* The Railroad (1894) 68 N. H. 247.